

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 26, 2006 Session

IRVIN EUGENE MURR v. ANGELINE J. MURR

Appeal from the Chancery Court for Giles County
No. 2696 Jim T. Hamilton, Judge

No. M2005-01377-COA-R3-CV - Filed on August 31, 2006

In this appeal, Mother challenges the trial court's designation of Father as primary residential parent of the parties' only child after the termination of a two and a half year marriage. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

M. Andrew Hoover, Pulaski, Tennessee, for the appellant, Angeline J. Murr.

Paul A. Bates, Lawrenceburg, Tennessee, for the appellee, Irvin Eugene Murr.

OPINION

Mr. Irvin Murr and Ms. Angeline Murr were married on September 16, 2002, in Pulaski, Tennessee. The parties' only child was born on March 12, 2003, and Ms. Murr ceased working at that time, acting as the child's primary caregiver. However, after the birth of the child, the parties began having disagreements.

On July 30, 2003, Ms. Murr called the police to the parties' home. Ms. Murr had accused Mr. Murr of stealing money from the parties' joint checking account. The argument escalated when Mr. Murr allegedly removed the telephone cord from the wall in order to prevent Ms. Murr from calling the police. Ms. Murr thereafter struck Mr. Murr on the head with a steak sauce bottle. When the police arrived, Mr. Murr voluntarily left the marital home in order to stabilize the situation. The parties' minor child and Ms. Murr's daughter from a previous marriage were witness to the argument.

A second incident occurred in September 2003, when Ms. Murr accused Mr. Murr of having an extra-marital affair. Ms. Murr ordered Mr. Murr to leave the marital home and threatened him

with the use of his gun, which was located inside the home. When Mr. Murr attempted to leave, Ms. Murr assaulted Mr. Murr in the presence of the parties' minor child, scratching the back of his neck. Mr. Murr called the police once he had left the residence in order to have the police escort him back to the home to retrieve some personal items. On September 23, 2003, Mr. Murr filed a Complaint for Divorce.

Sometime after the parties separated, a woman came to Ms. Murr's residence and shot a gun into the air outside the house. Ms. Murr's daughter from a previous marriage was alone outside at the time of the incident. Ms. Murr claimed that although she knew the woman, she did not know why the woman came to her house or why the woman shot the gun into the air. Ms. Murr and her ex-husband filed charges against the woman; however, the court found the woman incompetent to stand trial. After this incident, Ms. Murr agreed to allow the court to designate her ex-husband as primary residential parent of the parties' daughter.

Despite the prior domestic turmoil, Mr. and Ms. Murr reconciled and moved into an apartment together in Nashville with the minor child. However, on January 8, 2004, Mr. Murr accused Ms. Murr of having an extra-marital affair. Two days later, Ms. Murr vacated the apartment taking the minor child with her. An order of protection was entered against Mr. Murr on or about January 9, 2004. After a hearing at the end of January 2004, Mr. Murr was awarded three days of visitation with the child in mid-February. However, Mr. Murr did not exercise that visitation due to his concerns over violating the court's order of protection which was not dismissed until March 25, 2004.

On March 26, 2004, an order was entered reinstating a temporary parenting plan providing for alternating weekly parenting time. However, Ms. Murr filed a motion to set aside the order due to her concerns that Mr. Murr would not return the child if granted visitation. As such, Mr. Murr had no visitation with the parties' child from January 9, 2004, until May 29, 2004. From May 29, 2004, until the time of trial, Mr. Murr consistently exercised alternate weekly visitation.

On April 6, 2005, Mr. Murr's Complaint for Divorce was heard in a bench trial. The primary issue raised by the parties was the custody of the minor child. The evidence presented at trial showed that Ms. Murr was employed at a daycare in Pulaski, Tennessee, working from 9:00 a.m. until 6:00 p.m. and earning \$5.30 per hour. Ms. Murr also operated a beauty salon in Pulaski which netted approximately \$120.00 per month. Mr. Murr was employed by Tennessee State University as a full-time police officer, working from 8:00 a.m. until 4:00 p.m. Tuesday through Saturday. He also worked part-time for the Nolensville Police Department as an officer with variable hours. He claimed that his employment provided health insurance for the child and that he had also established a college education fund for the child.

With respect to the parties' residences, Mr. Murr testified that he lived in a three bedroom apartment in the Bellevue community along with the child's paternal grandmother. Mr. Murr claimed that although he maintained full-time employment, his mother was able to care for the child while he was at work. Ms. Murr testified that she lived in the parties' marital home which was

described as a two bedroom duplex in Pulaski, Tennessee. Ms. Murr claimed that her closest relatives lived approximately twenty miles from Pulaski, however, the parties' child would be permitted to attend the daycare facility at which she worked.

Based on the evidence presented by the parties at trial, the court designated Mr. Murr as primary residential parent of the parties' child. Ms. Murr's sole contention on appeal is that the trial court erred in its designation. In a non-jury case, the record is reviewed *de novo* with a presumption of correctness afforded to the trial court's determination of facts. Tenn.R.App.P. 13(d). The trial court's findings will be upheld unless the evidence preponderates against such findings. Tenn.R.App.P. 13(d). The trial court's findings of fact are entitled to considerable deference on appeal "[w]hen a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved." *Hodson v. Griffin*, No. E2005-01702-COA-R3-CV, 2006 WL 1627290, at *2 (Tenn.Ct.App. June 13, 2006). Furthermore, "the details of custody of and visitation with children are peculiarly within the broad discretion of the Trial Judge." *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn.Ct.App.1973).

When determining child custody, the court must decide which parent is comparatively more fit to have primary residential responsibility for the child. *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn.Ct.App.1996).

While both the trial court and the parties specifically considered only the factors in Tennessee Code Annotated section 36-6-106, it is clear from the record that we are considering a parenting plan controlled by the factors in Tennessee Code Annotated section 36-6-404(a). There is little practical difference between the factors set forth in section 36-6-106(a) and the factors in section 36-6-404(a). The aim of any decision based on any of these factors is to place the child in an environment that will best serve his or her needs. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001); *Hunter v. Hunter*, No. M2002-02560-COA-R3-CV, 2005 WL 1469465, (Tenn.Ct.App.Jun. 21, 2005).

The trial court first found that Mr. Murr was "in a better position to provide the child with food, clothing, medical care, education and other necessary care." It is uncontroverted that Mr. Murr makes significantly more money than Ms. Murr working as a police officer. Mr. Murr further testified that his mother, who lives with Mr. Murr, would assist in the care of the child while he is at work. Mr. Murr has also begun planning for the child's future by acquiring health insurance through his employer and by creating a college fund.

Conversely, Ms. Murr testified that she had no plans in the future to acquire a job paying more than minimum wage and that she presently relies on government assistance.

- Q. So you're voluntarily employed in a minimum wage job and have no plans in the future to try and change that?
- A. Maybe so, but as of right now I –
- Q. Right now you don't have any plans to change?
- A. There is nothing out there.

- Q. Right now you have no plans to change?
- A. No, sir. I think this daycare is fine. I don't see nothing wrong with it.
- Q. And you are still receiving WIC benefits?
- A. Yes, sir, I do.
- Q. I'm not that familiar with WIC. Is there an income level you have to be in order to get that?
- A. Yes, sir. And in my situation I was doing just fine, until I met Mr. Murr. And I had no banking account, I had no money. I had bills to pay, and I had to go to WIC. I have never had to do that before in my entire life. But you've got to do what you've got to do to survive.

Ms. Murr contends, however, that she would be permitted to bring the child with her to work and that she served as the child's primary caregiver before the parties were separated.

Since the parties were married for such a short period of time, we do not believe that Ms. Murr's role as primary caregiver is determinative. In addition, all other evidence presented at trial concerning the parties' ability to provide for the child weighs in favor of Mr. Murr. Therefore, we find that there is sufficient evidence in the record to support the trial court's finding that Mr. Murr is presently in a better position to provide the necessities for the parties' child.

The trial court next found that Mr. Murr had the ability to provide "a more stable satisfactory environment contributing greatly to the continuity in the child's life." Since the child has not consistently lived in one location for more than six months and because the child currently alternates weeks at each parent's residence, we do not believe that continuity is relevant to this determination.

The court also found influential the fact that Mr. Murr has family, specifically his mother, who is able to care for the child when Mr. Murr is unavailable due to work. Ms. Murr has no family in Pulaski to help with childcare since her closest relatives reside approximately twenty miles from town. Based on the record, we agree with the trial court that Mr. Murr has the ability to provide a more stable and satisfactory living environment for the parties' child.

Although the court did not specifically address the mental and physical health of the parties in its final order, we find that Ms. Murr's conduct during the deterioration of the marriage supports the trial court's judgment. The police were called to the marital home on two instances due to domestic disputes between the parties. In both instances, Ms. Murr resorted to physical violence against Mr. Murr in the presence of the minor child. Ms. Murr's conduct, whether or not provoked, raises serious questions about Ms. Murr's ability to manage her anger in a healthy manner.

The trial court finally found that Ms. Murr was not fostering a healthy relationship between Mr. Murr and the child. Despite testimony from both parents that they were willing to encourage and facilitate a close relationship with the other parent, the record is replete with evidence of Ms. Murr's attempts to thwart Mr. Murr's visitation. When Ms. Murr left the marital home in the beginning of January 2004, she immediately filed an order of protection against Mr. Murr, making

visitation difficult if not impossible. When the order was finally lifted on March 25, 2006, Ms. Murr filed a motion to set aside the reinstatement of a temporary parenting plan which provided Mr. Murr alternating weekly visitation. As a result of Ms. Murr efforts, Mr. Murr had no visitation with the parties' child for close to four months.

Ms. Murr's ex-husband also testified to Ms. Murr's unwillingness to facilitate additional visitation with their daughter.

- Q. What about since you've been divorced; initially you didn't have custody?
- A. Right.
- Q. And what was Ms. Murr's attitude about giving you some additional time other than what was ordered?
- A. It was hard to get time, extra time.
- Q. Did you ask for it?
- A. Yes, sir.
- Q. Did you ask for it regular?
- A. Yeah, I would ask for it, but most of the time the answer was "no".
- Q. Did you think that that was helping foster a good relationship between you and [your daughter]?
- A. No.
- ...
- Q. What would be her excuse or her reasoning when you would ask for extra time? Did she ever make any statements of why she wouldn't allow you to have extra time?
- A. She would just say we've got plans, or either we've got to go by the papers.
- Q. Were you ever afforded the opportunity to keep [your daughter] if she needed childcare?
- A. A lot of times, no. She would get a babysitter.

Clearly, it is in the child's best interest to have a close relationship with both parents. Despite her statements to the contrary, Ms. Murr's actions reveal an unwillingness to actively facilitate and encourage a strong relationship between Mr. Murr and the child. The trial court noted this unwillingness in its May 11, 2005, judgment.

Among the factors that are common to Tennessee Code Annotated sections 36-6-106(a) and 36-6-404(a) are:

1. The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.
2. Each parent's employment schedule.
3. The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care.

4. The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child.

In each of these factors, the trial court has favored Mr. Murr.

The single issue asserted on appeal is the designation of a primary residential parent by the trial court. Much of the material in the appellate record is of little help in appellate review of this issue. The record contains both the deposition and in-court testimony of one Pamela Watt. Her fanciful and melodramatic testimony under oath is belied by the taped recording of her telephone conversation with Angeline Murr. The recorded conversation, however, is that of two women commiserating over their combined misfortune of ever having met Irvin Murr. Angeline Murr dominates the conversation with a biographical history of her marriage with Pamela Watt responding sporadically with recitations of her own experiences with Irvin Murr. The conversation would have much influence on grounds for divorce, but such is not an issue before this Court on appeal.

Aside from Pamela Watt, the court heard only from the parties; Eddie Gibson, former husband of Angeline Murr; and Niki Gibson, teenage daughter of Angeline (Gibson) Murr and Eddie Gibson.

The trial court in this case was presented with two parents, both of whom love their child, who obviously reciprocates their affections. The parties' views of each other reflected in the divorce proceedings sharply contrast, particularly as to which of them should be primary residential parent. The trial court made fact determinations based on conflicting testimony which comes before this Court with a presumption of correctness unless the evidence in the record preponderates against that judgment. *See* Tenn.R.Civ.P. 13(d). Allowance must also be made on appeal of this fact-sensitive issue for another well settled consideration.

One of the most time-honored principles of appellate review is that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determination. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn.1990); *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn.1989). Accordingly, appellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary. *See Bingham v. Dyersburg Fabrics Co., Inc.* 567 S.W.2d 169, 170 (Tenn.1978); *Thompson v. Creswell Indus. Supply, Inc.*, 936 S.W.2d 955, 957 (Tenn.Ct.App.1996).

The most often cited reason for this principle can be traced to the fact that trial judges, unlike appellate judges, have an opportunity to observe the manner and demeanor of the witnesses while they are testifying. *See Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn.Ct.App.1991). There are, however, other reasons for this principle. As the United States Supreme Court has observed:

The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Anderson v. City of Bessemer City, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

The advisory committee note to Fed.R.Civ.P. 52(a), which requires that deference be given to the trial judge's opportunity to judge the credibility of witnesses, lists three important policy concerns behind the rule: (1) upholding the legitimacy of the trial courts to litigants; (2) preventing an avalanche of appeals by discouraging appellate retrial of factual issues, and (3) maintaining the allocation of judicial authority. The policy underpinnings of Fed.R.Civ.P. 52(a) advance the public's interests in stability and judicial economy, and we view them as equally important to Tennessee's citizens and courts.

Mitchell v. Archibald, 971 S.W.2d 25, 29 (Tenn.Ct.App.1998).

The record in this case reflects a hotly-contested battle over the behavior of the two parties as relates almost exclusively to the grounds for divorce. Scant attention is given in the proof to the relative parenting skills of the two parents and to the factors provided by statute to be used in parenting determinations. The trial court was hampered, as are we, by the limited proof offered by the parties. Under these conditions we cannot say that the evidence preponderates against the action of the trial court.

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of appeal are assessed against Appellant, Angeline Murr.

WILLIAM B. CAIN, JUDGE